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Entrenching Solicitor-Client Privilege in the Context of Administrative Regulators

The SCC Puts a Stop to the Compelled Disclosure of Solicitor-Client Privileged Documents

*Jeffrey S. Percival**



"Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible"...It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised..." – per Binnie J., Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9.

Can a regulator compel the production of documents over which a privilege is claimed, even if only to determine whether the claim of privilege is justified?

In the recent decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 ("Blood Tribe"), the Supreme Court of Canada unanimously answered that question in the negative, concluding that the role of determining the validity of a claim of privilege falls to the courts unless there are express words in the regulator's enabling statute permitting it to assert such jurisdiction.

In *Blood Tribe*, an employee of the Blood Tribe Department of Health asked to see her personal employment information following her dismissal. She suspected that the employer had gathered in accurate information and used it to discredit her before its board of directors. When the employer refused the request, she filed a complaint with the federal Privacy Commissioner seeking access to her personal file. When the Commissioner requested the



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personal file in broad terms, the employer provided all documentation except those over which the employer claimed solicitor-client privilege.

Faced with the claim of privilege, the Commissioner ordered production of the allegedly privileged documents pursuant to s. 12 of the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). Section 12 confers upon the Commissioner the power to compel the production of any records “in the same manner and to the same extent as a superior court of record” and to “receive and accept any evidence and other information...whether or not it is or would be admissible in a court of law.” The employer appealed the order to the Federal Court, who agreed with the Commissioner, and then to the Federal Court of Appeal, which set aside the decision of the reviewing judge and vacated the Commissioner’s order.

The Commissioner appealed to the Supreme Court of Canada. While the discrete issue relevant to the case involved a conflict between the Commissioner’s statutory power to have access to personal information about a complainant for the purpose of ensuring compliance with the PIPEDA and the right of the employer to keep solicitor-client confidences confidential, the Supreme Court’s decision in *Blood Tribe* was expected to reverberate into the sphere of Canadian competition, environmental and securities regulation.

After reviewing the recent jurisprudence on solicitor-client privilege and the leading authorities on statutory interpretation, Justice Binnie held that in a consideration between general language affording a regulator powers akin to a superior court of record and the continued confidentiality of solicitor-client privilege, the latter must always prevail.

In particular, Justice Binnie noted that while she is an officer of Parliament vested with administrative powers of undeniably great importance, the Commissioner does not hold the same position of independence and authority as a court when it comes to reviewing claims of solicitor-client confidences. Accordingly, the Court held that broadly worded statutory grants of authority do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. For the Commissioner to have such a power, “express words are necessary to permit a statutory official to ‘pierce’ the privilege”. As such clear and explicit language does not appear in the PIPEDA, the Commissioner is not granted the authority to compel disclosure of privileged documents.

On a broader scale, the *Blood Tribe* decision is likely to have a significantly dampening effect on the ability of regulators to use a “carrot and stick” approach to encourage the disclosure of information. For instance, the Ontario Securities Commission (“OSC”) currently uses a “Credit for Cooperation” policy (OSC Staff Notice 15-702), under which market participants may be given credit, in terms of the reduction of potential sanctions, for complying with production orders and summonses issued by the OSC. The *Blood Tribe* decision is expected to have the effect of reducing the ability of the OSC to compel the production of solicitor-client privileged documents. It is also conceivable that the compulsory nature of production orders under the “Credit for Cooperation” policy may ultimately become the subject of a challenge under the *Charter of Rights and Freedoms*.

While the *Blood Tribe* decision is consistent with other recent Supreme Court of Canada jurisprudence that re-confirms the sanctity of solicitor-client privilege in Canada, it remains to be seen whether an individual or organization facing significant administrative or penal sanctions will forgo the protections afforded by this decision by waiving privilege on the production of documents in order to avoid the heavy costs and potentially adverse publicity of a drawn-out confrontation with a regulator.

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Admissibility of Expert Opinions: The Court of Appeal Issues a Warning about “Expert Generalists”

Dawn K. Robertson

Trial judges who take a “let-it-all-in” approach to the admissibility of expert evidence risk having their decision-making function eroded by so-called “expert generalists” whose opinions are based on shallow knowledge or experience. Justice Moldaver issued this warning in *Johnson v. Milton (Town)*,¹ a recent decision of the Court of Appeal. In his reasons, Justice Moldaver reminded trial judges of the importance of their gatekeeper role in qualifying expert witnesses. Furthermore, he cautioned that the evidence of expert generalists not only interferes with the adjudication of the factual issues, but increases the complexity and cost of the proceedings and often delays the hearing, which can have significant consequences for the justice system as a whole.

In *Johnson v. Milton (Town)*, Nelly Johnson brought an action in negligence against the Town of Oakville. Johnson’s husband was killed and Johnson suffered serious injuries in a bicycle accident on an Oakville road. Johnson and her husband were riding a tandem bicycle downhill towards a single lane bridge when they lost control of the bicycle and collided with a rock embankment. Johnson claimed that the section of the road where the accident had occurred was in a state of disrepair and that Oakville had failed to properly maintain the road.

At trial, Johnson sought to qualify Zygmunt Gorski as an expert in accident reconstruction. In response, Oakville asked the Court to delineate the precise areas for which Gorski had special training, experience or knowledge, thereby limiting the scope of his opinion evidence. According to Oakville, Gorski’s principal field of expertise was limited to vehicle occupant restraint systems. Gorski had been working as a self-employed consultant for 13 years and had never worked for a road authority or municipality. Oakville argued that Gorski had no hands-on experience with road maintenance and no special expertise regarding the impact of road conditions on bicycles. Despite Oakville’s objections, the trial judge qualified Gorski as an “expert in accident reconstruction, including the behavioural, vehicular and the environmental factors involved in highway accidents”.² The trial judge later determined that Oakville was entirely responsible for the accident and awarded substantial damages to Johnson.

Oakville’s primary ground of appeal was the trial judge’s “let-it-all-in” approach to Gorski’s evidence. Oakville argued that the trial judge had wrongly permitted Gorski to give crucial opinions on contentious issues about which he had no special skill, knowledge or training.

In his analysis of the admissibility of Gorski’s evidence, Justice Moldaver referred to the general principles on expert evidence as outlined in the Supreme Court of Canada’s decision in *R. v. Mohan*.³ In that case, Justice Sopinka held that a properly qualified expert must have “acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify”.⁴ Furthermore, the trial judge must act as a gatekeeper by weighing the probative value of the expert evidence against its prejudicial effect, the time required to hear the evidence and the potential of the evidence to mislead the trier of fact.

On the issue of whether Gorski was properly qualified, Justice Moldaver noted that expert generalists, who give evidence on matters that are commonplace or for which they have no special skill, knowledge or training, pose a danger to the trial process. “The problem with such witnesses,” said Justice Moldaver, “is that while they may appear knowledgeable and generally come across well, upon closer scrutiny, their opinions may well

turn out to be little more than concoctions consisting of guesswork, speculation, commonplace information and junk science, with a hint of valid science thrown in for good measure.”⁵

Justice Moldaver went on to explain that the trial judge’s gatekeeper role is particularly important in light of expert generalists. If the trial judge does not perform this gatekeeper role effectively, she may have her decision-making function usurped by expert generalists “who profess to know something about everything and who are only too willing to provide the court with a ready-made solution for any contentious issue that might exist.”⁶

Justice Moldaver acknowledged that a trial judge may be more flexible in his or her approach to expert evidence when sitting alone than if the matter was tried by a jury. Nevertheless, the “let-it-all-in” approach is “inadvisable” when a trial is conducted by judge alone.⁷

On the basis of this analysis, Justice Moldaver concluded that Gorski should not have been permitted to testify about matters about which he had no special training, knowledge or experience. In the particular circumstances of the case, however, Justice Moldaver held that the trial judge’s “let-it-all-in” approach to admissibility did not result in any prejudice to Oakville. The trial judge’s reasons showed that he did not rely on Gorski’s opinion in coming to a determination on causation; in fact, the trial judge’s findings on causation differed considerably from Gorski’s opinion.

Justice Moldaver’s comments in this case are particularly significant when considered in light of Justice Osborne’s review of expert evidence in the *Civil Justice Reform Project: Summary of Findings and Recommendations*.⁸ In his report, Justice Osborne identifies the proliferation of experts as a significant problem that increases the cost of litigation and causes delay through trial adjournments.⁹ Justice Moldaver echoed this problem in his comments. Counsel should, therefore, carefully consider the question of whether to engage an expert and rigorously evaluate the qualifications of a potential expert. Counsel can safely assume that trial judges and appeal courts will, in future, challenge the qualifications and conclusions of expert generalists.

¹ [2008] O.J. No. 2157 (C.A.).

² [2006] O.J. No. 3232 (Sup. Ct. J.) at para. 57.

³ [1994] 2 S.C.R. 9.

⁴ *Ibid.* at 25.

⁵ *Supra* note 1 at para. 49.

⁶ *Ibid.*

⁷ *Supra* note 1 at para. 47.

⁸ November 2007, <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.

⁹ *Ibid.* at 69 and 71.

Not So “Special” After All: The *Limitations Act* and the Evolving Doctrine of “Special Circumstances”

Sam Hall*

The annual release of the Annotated Rules of Civil Procedure is always a time for celebration. The latest edition of the blue book was likely at press when the Court of Appeal concurrently released its decisions this past summer in *Joseph v. Paramount Canada’s Wonderland*¹ and *Meady v. Greyhound Canada Transportation Corp.*² Unfortunately, these cases missed inclusion (this time around) in the greatest hits of yesteryear.

In the *Wonderland* and *Greyhound* cases, the Court clarified the relationship between the common law doctrine of “special circumstances” and the *Limitations Act, 2002*, S.O. 2002, c. 24. The common law doctrine of special circumstances conferred discretionary powers on the court to allow the extension of a limitation period in situations where a litigant sought the addition of parties to an action or the amendment of a pleading after the expiry of a limitation period. Such discretion was typically exercised by the court in motions brought under Rules 5.04(2) and 26.01. This common law doctrine could be relied on where “special circumstances” existed and where the amendment sought would not prejudice any of the parties in a way that could not be compensated for with either costs or an adjournment. A solicitor’s inadvertence resulting in a missed limitation period was often found to constitute the “special circumstances” required to apply the doctrine.

While the doctrine of “special circumstances” may still be invoked in that ever diminishing cohort of cases where the transition provisions of the new *Limitations Act, 2002*, apply (as in *Greyhound*), the *Wonderland* decision is a clear pronouncement by the Court of Appeal that the Legislature, with its introduction of the new limitations regime, did not intend to preserve the common law discretion to extend limitation periods. In other words, the doctrine of “special circumstances” does not apply to cases governed by the limitation periods of the new Act.

In *Wonderland*, the plaintiff suffered injuries at the defendant amusement park on September 5, 2004. The parties agreed that the new Act, which came into effect on January 1, 2004, applied to the claim and that the claim was discovered on the date of the injury. The defendant was notified of the injury in September 2004 and obtained a written statement from the plaintiff and substantial medical documentation concerning the injuries well before the two-year anniversary of the incident.

The plaintiff’s lawyer instructed his assistant that a draft claim was to be issued before September 5, 2006. The assistant went on vacation in the week of September 4, 2006... and did not issue the claim. (Apparently, the assistant believed that the six year limitation period provided under the former Act applied.)

The lawyer learned of this error on October 31, 2006 and immediately forwarded a draft claim to the defendant and issued the claim that day. The defendant moved under rule 21.01(1) to determine, as a question of law, whether the action was statute barred. The motion judge held that the action was barred by the two-year limitation provided by section 4 of the *Limitations Act, 2002*, but that he had discretion under the doctrine of special circumstances to extend the time to commence the action. According to the motion judge, special circumstances existed where there was inadvertence on the part of the plaintiff’s lawyer and no prejudice to the defendant.

In reversing the motion judge, Feldman J.A. considers Section 20 of the *Limitations Act, 2002*, which states that the Act “does not affect the extension, suspension or other variation of a limitation period or other time

limit by or under another Act.” Noting that Rules 5.04(2) and 26.01 of the *Rules of Civil Procedure* had previously been used to extend statutory limitation periods through the doctrine of special circumstances, she rejects the argument that because the Rules are authorized to be made under the *Courts of Justice Act*, they are made “under another Act” such as to invoke the carve out of Section 20 of the *Limitations Act, 2002*. Her Honour concludes that it is not the Rules themselves that explicitly dictate such discretionary extensions of limitation periods and therefore, “[...] it would be extending the meaning of ‘under another Act’ too far to interpret it as including the application of common law principles used to apply the Rules [...].”

The Court bolsters this interpretation with reference to Section 66(3) of the *Courts of Justice Act*, which provides:

“Nothing in this subsection (1) or (2) [describing the powers of the Civil Rules Committee to craft rules of procedure] authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) supplementing the provisions of an Act in respect of practice and procedure.”

The Court notes that the possibility of amending a pleading or adding a party at any stage in an action (Rules 26 and 5.04, respectively) cannot act to extend the limitation periods provided in the new Act. This is a sound interpretation in light of section 21 of the Act, which specifically prohibits the addition of a person as a party to an action after the expiry of a limitation period, no matter what compelling circumstances are present. Finally, and perhaps to the surprise of many, the Court points out that the doctrine of special circumstances only contemplated the power to amend or add a claim or party to an existing action, and did not confer authority to allow an action to be commenced after the expiry of a limitation period.

It would appear that nothing short a legislative amendment of the Act would restore the court’s discretion to provide for extensions to limitation periods in the event of a solicitor’s inadvertence. This, however, seems unlikely given the Court of Appeal’s seeming reluctance to wield a power which in former times was thought to create a perception of arbitrariness and uncertainty which the new Act is intended to address.

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¹ [2008] 90 O.R. (3d) 401

² [2008] O.J. No. 2338

Class Actions and Judicial Conflict

Colin P. Stevenson*

Merck Frosst's withdrawal of the anti-inflammatory drug, Vioxx, from the market on September 30, 2004, not only led to a huge amount of litigation in the U.S. and Canada (thousands of individual actions in the U.S. and more than 160 class actions), a huge corporate cost in the U.S. (a settlement fund of approximately \$4,850,000 that will start being paid out in the near future), but now also to a huge judicial conflict in Canada. This note will summarize that conflict and look ahead to the much anticipated argument currently scheduled for the Saskatchewan Court of Appeal on September 16-18, 2008.

The basis of the underlying claim against Merck is essentially twofold. Merck is alleged to have negligently designed, manufactured and distributed a drug which was defective because it imposed an undisclosed and excessive risk of adverse cardiovascular events in patients. The other principal claim is based on waiver of tort. If the latter claim is successful the defendants will have to disgorge their gross revenues or net sales rather than pay the class' damages. This subject is, however, for another day.

The topic here is the conflict arising from the commencement in Canada of multiple class actions in every province shortly after Vioxx was withdrawn from the Canadian market on September 30, 2004. The vast majority of the counsel across the country who commenced Vioxx claims immediately agreed to work together in a group known as the National Consortium. One group led by Anthony Merchant, Q.C. (the Merchant Group), based in Saskatchewan, however, insisted on proceeding independently.

Carriage motions were scheduled in various provinces including Ontario and B.C. Only one of these motions has been argued. By reasons released February 2, 2006, Justice Winkler in *Settingington v. Merck Frosst* (2006), O.J. 376, now known as *Tiboni v. Merck Frosst*, ordered that the Ontario action in which a national class was sought, other than for Québec, should continue under the control of the National Consortium. The court stayed the Merchant Group's Ontario action (in which the plaintiff was a Mr. Wuttunee).

Unusually, Mr. Wuttunee was also the plaintiff in a similar class action commenced in Saskatchewan. Mr. Wuttunee was also represented in Saskatchewan by the Merchant Group. Notwithstanding the Ontario order, the Merchant Group went ahead with a certification motion in Saskatchewan, initially unbeknownst to the National Consortium. The Saskatchewan court certified Wuttunee's claim against Merck Frost on February 15, 2008, for Saskatchewan residents who had consumed Vioxx *and* for non-residents on an "opt in" basis. The Ontario action, seeking to certify a national class (other than for Québec, where separate proceedings were being pursued) was still pending.

Thus, confusion arose among class members, because an Ontario resident now could opt into the Saskatchewan proceeding, although there was a motion pending in Ontario in which, if certified, the same person would likely become a class member unless they expressly opted out.

Matters would become even more confused. The Saskatchewan *Class Actions Act*, S.S. 2001, c. C.12.01, was amended as of April 12, 2008, converting Saskatchewan from an "opt in" jurisdiction to an "opt out" jurisdiction.

On May 2, 2008, Wuttunee (still represented by the Merchant Group) applied to amend the Saskatchewan certification order to change it from an "opt in" class for non-residents to an "opt out" class for non-residents. If granted, Ontario residents would automatically be class members in the Saskatchewan proceeding, unless they expressly opted out.

Notwithstanding opposition from the National Consortium, Chief Justice Klebuc on May 29, 2008 approved the change, thereby including all residents of Canada outside Québec (2008 S.J. No. 234 Q.B.) unless they opt out. This order creating a Saskatchewan based national “opt out” class appears to be inconsistent with Justice Winkler’s February 2, 2006 Ontario order denying the Merchant Group carriage of their Ontario action in which they had proposed a national class based on the Ontario issued Wuttunee claim (which Justice Winkler stayed).

Chief Justice Klebuc’s decision has been appealed by Merck Frosst and that appeal is to be argued on September 16-18, 2008.

In the meantime, the Ontario certification motion, being pursued by the National Consortium (formerly *Setterington*, now *Tiboni v. Merck Frosst*) was argued in Ontario in June 2008, together with Merck Frosst’s motion to stay the Ontario proceeding pending the Saskatchewan appeal.

In reasons released July 28, 2008, Justice Cullity not only declined Merck Frosst’s request for a stay of the Ontario action, but also certified *Tiboni* as a national “opt out” class (other than Québec and Saskatchewan). Justice Cullity was careful to say he was not critiquing the decision of Chief Justice Klebuc (para. 21) although he emphasized that comity was a “two way street”.

Merck argued for a stay of the Ontario proceeding on a number of grounds. Justice Cullity (para. 30) rejected the proposition that Saskatchewan should be favoured because it is a no cost regime (whereas Ontario courts may award costs against unsuccessful plaintiffs) (paras. 31-33). Justice Cullity also rejected the argument that Saskatchewan’s justice system is more efficient and expeditious than that in Ontario. While the court agreed (para. 36) that a multiplicity of proceedings is to be avoided, the main question for Justice Cullity was whether the Saskatchewan decision to expand the Saskatchewan class to a national “opt out” class should be allowed to undermine Justice Winkler’s 2006 Ontario decision that Wuttunee and the Merchant Group should not have carriage of the national class action which was then being pursued in Ontario by both sets of counsel. Justice Cullity particularly emphasized that priority should not be granted to a jurisdiction in which claims are first made (a view which also finally appears to be gaining some ground in Québec).

In the final analysis, Merck’s request for a stay of the Ontario action was denied because the Ontario court was not prepared to let a subsequent Saskatchewan decision (that of Chief Justice Klebuc) effectively undermine the previous Ontario court order (that of Justice Winkler) staying Wuttunee’s proposed national class action. As Justice Cullity noted (para. 41) the result is “unfortunate”. Justice Cullity then stated:

“If decisions of provincial courts on carriage motions are not to be respected throughout Canada, this merely underlines—and makes even more urgent—the need for an agreement or protocol among the Superior Courts that will provide for nationally-accepted carriage motions and determine the jurisdiction in which such motions will be heard. The recommendations of a committee on the Uniform Law Conference address the question of multi-jurisdictional class actions in different courts but, arguably, would give undue deference to the proceeding that is the first to be certified. To this extent they endorse what appears to be the prevailing view among counsel that the race is to the swift. I hope that we are able to do better than that.”

It now remains to be seen how the Saskatchewan Court of Appeal will deal with this matter. Of course, it is unlikely they will have the last word. The issue seems destined for the Supreme Court of Canada, whether in this case or another.

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Bijural Harmony on the Plains of Abraham: OBA Participation at the Uniform Law Conference of Canada

R. Lee Akazaki*

National Battlefields Park, *a.k.a.* the Plains of Abraham in Québec City, provided a fitting backdrop for the 90th Uniform Law Conference of Canada this past August 10th to 14th. The ULCC's mandate is the harmonization of Canadian laws, internally and in accordance with international conventions. Leaders from the bench, bar, government and academia convened to identify the pressure points in our diverse jurisdictions, and to devise legislative solutions. The scene of the 1759 clash for possession of North America, the Plains are now a picturesque locale for a morning jog, an evening stroll, or, in the 400th anniversary of the city's founding by Samuel de Champlain, a summer festival to which tourists have flocked from all over the globe. Yet this symbol was once the crucible in which people from two colonial empires came to live together. Here was the origin of a bijural system in which the Common Law lives in harmony with the Civil Law.

The OBA again joined the Ontario delegation to the ULCC. The invitation recognized need for input from the practicing bar in the development of law reform in interprovincial and international contexts. The ULCC considered an ambitious agenda of no less than 15 projects, as well as representations from sister organizations from the United States, Mexico and Australia. (Ever heard of the U.S. *Uniform Commercial Code*? This extraordinary and flexible body of law provides model commercial law for the 50 states of the union.) The legislative projects ranged from a uniform income trust statute, to a uniform Anti-SLAPP Act (Strategic Litigation Against Public Participation), and to the development of a Canadian law of paternity and maternity for sperm donors and surrogate mothers. We even heard a report of Mexico's efforts to transform its criminal justice system from an inquisitorial documents-based procedure to an oral adversarial trial process.

The most impassioned exchange arose from an unlikely subject: a debate between two law professors, Michael Deturbide of Dalhousie Law School, and Vincent Gautrais of the Université de Montréal, over the electronic document concept in the *United Nations Convention on the Use of Electronic Communications in International Contracts*. Ostensibly a controversy over legal semiotics, the concepts reverberate into the very heart of contract law in the digital age. Deturbide scrutinized the Convention and the common law treatment of electronic commerce. He saw no substantial differences and advocated our adoption of the Convention. Common law practitioners are to some extent resigned to the proliferation of legal standards for information and communications technology, and the difficulty of the law in keeping up with them. In these times, the Sedona Conference guidelines, electronic title registration, and other legal regimes have sprung up with their own standards. It was therefore ironic that lawyers from the common-law jurisdictions could not, at first, fathom the civilian objection to the adoption of yet another regime. After all, the common-law lawyers maintained, the Convention only applied to international contracts.

Gautrais met with some resistance from common-law delegations over his position that the Convention had not kept pace with developments in the Québec Civil Code. He submitted that the Code's concept of a contractual document had expanded to provide flexibility for new media, so as to include pictures, sounds and other non-verbal representations in a legal document. Under the Code, "integrity" determines the legal value of any document, regardless of the medium on which the information has been recorded. The "document" could also include ceremonial acts signifying agreement. The Convention more or less turned this framework on its head. In the view of the Québec delegation, the Convention represented a step backward. On the

one hand, the Convention adopted a restricted writing requirement which could not adapt to new modes of contractual expression. On the other, by relaxing the requirement of a writing as long as it is “available so as to be usable for subsequent reference” (read website hyperlinks, or *whatever next*), it relaxes the data preservation requirement by accepting incorporation by reference. The Convention introduces the risk that contracting parties whose record of agreement could vanish at any time after it was entered into, or could suffer alteration. In this regard, we were urged not to sacrifice contract law at the altar of progress.

A previous generation once developed the phrase, *not worth the paper it's written on*, to decry the decline of contractual obligations in the modern world. Was it not at the University of Toronto's Cecil A. Wright Memorial Lecture that Robert E. Scott delivered his famous 2004 lecture, *The Death of Contract Law*? As lawyers, we search for order and certainty in our clients' lives and enterprises, while allowing them to prosper in a global economy. The common-law delegates at the ULCC were asked to reconsider their position. In the end, what was the ULCC's resolution? A unanimous vote to keep working and monitoring the harmonization of Canadian law on electronic contract law, but not to adopt the convention at this time.

For those in the 21st Century who fear the advance of global commerce is killing contract law, perhaps they should witness the development of a new lease on life. *Je me souviens*: the phrase now signifies a paramountcy of memory. In 1883, Québec City architect Eugène-Étienne Taché, carved these words into the stone above the entrance to the spectacular Parliament Building. Québec legislators have recognized the challenge of preserving contractual certainty and integrity in the digital age. They, like Taché, wanting to preserve the historical past, have their eye (or webcam) on the future. The Ontario delegation emerged with reason to contemplate some cutting-edge work being performed in Québec legal circles on the preservation of contracts as legally binding obligations.

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Message from the Chair

R. Lee Akazaki*



Civil Lit Confidential

Despite our duty to our clients, we are not their mouthpieces. Despite our respect for the legal institutions we serve, it is also our role to ask questions and make them better. Contrary to some popular opinion, lawyers are thoughtful, not just clever. Just to prove that we are, we are dropping the gauntlet and calling upon any and all OBA Civil Litigation Section members to line the pages of this newsletter with objective and thought-provoking articles. As a quid pro quo for this call for submissions, the Chair's message this year will contain a new feature: the Civil

Lit Confidential. As in the case of the child who asked why the emperor was wearing no clothes, the challenge for this editorial message is to identify a single, discrete point of the civil litigation practice whose rationale most of us have never seen fit to question. It could be a rule of evidence, a point of civil procedure, anything to do with civil process.

In the May, 2008, issue, I asked the question: “*What does 1% liability look like?*” The premise was rather simple for any law school graduate. In the world of joint and several liability, the principle is that an apportionment of 1% liability will nevertheless result in 100% liability to the plaintiff. Apart from a few instances where 1% was admitted or agreed, a search for actual instances where a court has adjudged and apportioned 1% liability against a defendant, based on a weighing of evidence, turned up blanks. (I have been told that article has been picked up in the ministerial research process for the Ontario government’s review of proportional liability in tort. I encourage all you legal scribes out there to send us your work: you *can* make a difference!)

Let us examine the common-law legal standard of proof in almost all civil cases. Subject to niche areas in which the burden of proof is reversed, the plaintiff must prove all the elements of his or her case on a balance of probabilities, i.e., 51%.

The rationale for the 1% differential in the tactical burden is hardly sophisticated. In the courts, the administration favours the dismissal of the pursuer’s action, albeit by the slightest of margins. As in the case of 1% liability, one would suspect that the real margin is higher. Depending on the trier of fact, it is human nature to protect the status quo and to expect a plaintiff to show a more compelling case than the defendant. We expect our judges to be representative human beings: a human being could rarely be expected to resolve a close call to within 1%. The umpires cannot do it in baseball. *Tie goes to the runner*—there is actually no such rule. It is an umpire convention arising from the interpretation of the word “before” in the rule defining when a base runner is deemed to be “out.” But what works in a sport—where all rules are arbitrary—does not necessarily work for a court with equitable jurisdiction. The sporting analogy only proves that a 1% burden is both arbitrary and unfair. Our Supreme Court’s abandonment of a similar rule, the age-old “doctrine” of *res ipsa loquitur* (which favoured plaintiffs), illustrates that these questions are not fanciful and must be raised.

The judicial task is to make a decision, not to rely on the law as a default decision-maker. Courts are required to choose whose version of fact is more probable. A 1% burden, however, is an adjudicative chimera. The fact a burden exists at all skews the process. For reasons similar to the judicial difficulty in finding a defendant 100% liable for 1% fault, in practice 1% means the burden is higher. A principled approach to a civil burden favouring the status quo would likely translate into a burden in the order of 55% to 60%. This comment should undoubtedly be greeted with approbation from our members who frequently act for plaintiffs, and invite protest from the defence bar, but that wider debate is not for this paper. Whatever the politics that

confront our membership on this issue (I take no sides), have we ever seriously examined why the law must keep a thumb on the scales of justice, whether for defendants or for plaintiffs?

Civil Litigation News and Dates in View

As ever, just because it was summer, your Civil Litigation Section Executive has not let the grass grow under its feet. Highlights of our work for you include:

July

Chris Jaglowitz and **Kevin Fisher** participated in the OBA's response to the Law Commission of Ontario's consultation paper on *The Law as it Affects Older Adults*. The OBA's response to the consultation paper can be found by clicking on the following link: http://www.oba.org/en/main/home_en/Newsdetails.aspx?no=NEWS07222008-5223-1E

Our Section's input at this stage is simply to help the LCO set the parameters for its project. In the meantime, any comments or observations that any of you might come up with over the coming months as to the law as it relates to older adults would certainly be useful and welcomed for inclusion in the next submission. For more information, contact Chris Jaglowitz at (416) 363-2614 or Kevin Fisher at (416) 365-0300.

August

Executive members met on August 21st to discuss priorities and subcommittee activities for the 2008-2009 term.

Jennifer McAleer, **Jeff Radnoff**, and **Lee Akazaki** presented "Civil Law Confidential: Three Tough Lessons" to 100 law and civics teachers at the Ontario Justice Education Network's *Summer Law Institute* for high school teachers. The presenters advocated the importance of introducing civil law and justice as a part of the high school curriculum, provided practical examples of the central role of civil law in everyday life, and a bird's-eye view of a civil dispute from demand letter to jury trial.

Your Award Dinner Committee, **Peter Henderson**, **Audrey Ramsay**, **Derek Freeman**, **Kathleen Kelly**, **Jeff Radnoff**, **Liam McAlear**, and **Lee Akazaki**, continued their planning of the marquee Civil Litigation event: **OBA Award of Excellence in Civil Litigation**, October 16, 2008. Last year's dinner was SOLD OUT. Avoid disappointment: register early!

Lee Akazaki represented the OBA on the Ontario delegation to the Uniform Law Conference of Canada in Québec City. Topics affecting civil litigators included work on a model Anti-SLAPP (Strategic Litigation Against Public Participation), Collateral use of Crown Disclosure Documents, and Malicious Prosecution. On a sad note, the Eastern Provinces team lost 14-13 in the annual East-West softball game.

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Upcoming Programs

2008 Award for Excellence in
Civil Litigation

October 16, 2008

Privilege, Confidentiality and Conflicts
of Interest: Traversing Tricky Terrain

October 23, 2008

Your First Collection II Deadbeat
Dilemmas: How to Get Paid (YLD)

November 19, 2008

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